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No. 87-1241

Supreme Court, U.S.

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In The  
**Supreme Court of the United States**  
October Term, 1987

COMMONWEALTH OF PENNSYLVANIA,  
*Petitioner,*  
v.

UNION GAS COMPANY,  
*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Third Circuit

**AMICUS CURIAE BRIEF OF PACIFIC LEGAL  
FOUNDATION IN SUPPORT OF RESPONDENT**

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**AMICUS CURIAE BRIEF OF PACIFIC LEGAL  
FOUNDATION IN SUPPORT OF RESPONDENT**

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**INTRODUCTION**

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation (PLF) respectfully submits this amicus curiae brief in support of respondent, Union Gas Company (Union Gas). Written consent to the filing of this brief has been granted by counsel for both parties. Copies have been lodged with the clerk.

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## INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board authorizes active PLF involvement in a case only when there is broad community support. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF believes that absolute state sovereign immunity, in this case, would be contrary to the intent of Congress, undermine the cleanup objectives of "Superfund," further impair individual rights and free enterprise, and erode confidence in our system of government. PLF has litigated numerous cases involving similar issues. PLF's public policy perspective and litigation experience will provide a valuable additional viewpoint in this critical case.

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## OPINION BELOW

The opinion of the United States Court of Appeals is cited as *United States v. Union Gas Company*, 832 F.2d 1343 (3rd Cir. 1987).

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## STATEMENT OF THE CASE

From 1890 until 1948 an industrial plant was operated adjacent to Brodhead Creek in Stroudsburg, Pennsylvania. The plant produced coal gas with coal tar as a by-product. The coal tar was buried on-site in a manner now

regarded by the Environmental Protection Agency (EPA), in its Amended Fund Authorization Report, as state of the art technology for the time. Control of the plant site changed hands several times until, in 1978, Union Gas obtained ownership of the property via merger.

Pursuant to a flood control easement, the State of Pennsylvania, between 1960 and 1962, rechanneled, narrowed, and deepened Brodhead Creek and erected dikes on its sides. The rechannelization of the fast flowing stream caused eventual downcutting of the creek and erosion at the toe of one of the dikes. In October of 1980 the state was excavating along the creek (to repair the damage caused by erosion) which led to the discharge of coal tar into the creek from the adjacent plant site. The spill area was designated by EPA as the nation's first Superfund site under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601, *et seq.*, Pub. L. No. 96-510. A cleanup of the site ensued from April, 1981, to January, 1982, at a reputed cost to the United States government of \$967,000.

On May 23, 1983, EPA sued Union Gas in the United States District Court for the Eastern District of Pennsylvania to recover its cleanup costs. Union Gas, in turn, filed a third party complaint against both Pennsylvania and the Borough of Stroudsburg alleging they were liable as facility owners or operators within the meaning of CERCLA, 42 U.S.C. § 9601(20)(A), and negligently caused or contributed to the release of the coal tar. The state moved to dismiss the third party complaint alleging it was immune to suit under CERCLA due to the Eleventh



Amendment of the United States Constitution. The District Court granted the state's motion.

The District Court also dismissed the action against the municipality when EPA, Union Gas, and the Borough of Stroudsburg agreed to settle, with Union Gas paying the major portion of the cost of cleanup. Union Gas then appealed the District Court's dismissal of Pennsylvania as a third party defendant. The United States Court of Appeals for the Third Circuit affirmed the District Court decision and determined that CERCLA did not clearly abrogate state Eleventh Amendment immunity.

On October 17, 1986, shortly after Union Gas filed a petition for writ of certiorari with this Court, the President signed into law the Superfund Amendments and Reauthorization Act of 1986 (SARA) (in combination with CERCLA, Superfund, or the Act), 42 U.S.C. § 9601, *et seq.*, Pub. L. No. 99-499. This Court granted certiorari, vacated the Court of Appeals' opinion, and remanded for consideration in light of SARA. On remand, the Third Circuit unanimously reversed the District Court. The Court of Appeals held that (1) the language of CERCLA, as amended by SARA, clearly abrogated state immunity; (2) Congress may abrogate the Eleventh Amendment under its Article I Commerce Power; and (3) Union Gas' cause of action under CERCLA, as amended by SARA, applies retroactively.

### SUMMARY OF THE ARGUMENT

Pennsylvania argues it cannot be sued in federal court by Union Gas due to Eleventh Amendment sovereign immunity. In this case, however, state sovereign immunity

would intrude on the ideal of liberty under law and unjustly protect the state from the consequences of its illegal act—the unauthorized release of a hazardous substance. Such a precedent would unduly limit the ability of Congress to take the steps necessary to protect the public health and the environment.

Congress expressed its intent to abrogate Eleventh Amendment immunity in CERCLA in 1980 when it defined liable "person" to include states. 42 U.S.C. §§ 9601(21) and 9607(a). Congress expressed its intent even more clearly in 1986 through SARA. "[A] State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title." 42 U.S.C. § 9601(20)(D).

Sovereign immunity, for a state that was an active agent in the creation of a chemical spill, should not be exalted above the interest of the people, the true sovereign, in protecting themselves from oppressive governmental acts. Nor should this Court fear that state liability will deprive the people of an essential public service. That concern, expressed by Justice Marshall in *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), is simply not applicable here. It was only when the state caused the spill that it fell under the scope of Superfund, not before, while engaged in flood control operations. Pennsylvania need not give up its sovereign immunity to provide flood protection or any other public service.

While acting for the public welfare, however, the state assumes a special duty. Pennsylvania had a constitutional

duty not to create a public burden and force it upon a private party. The cost of cleanup, necessitated by the state-induced spill, was a burden that properly should have been borne by the public as a whole and not shouldered by Union Gas alone. The state unfairly shifted the economic burden of its own illegal act onto an innocent landowner, without compensation, and thereby caused a taking in violation of the Fifth Amendment of the Constitution. See *Armstrong v. United States*, 364 U.S. 40 (1960).

Also, Pennsylvania must not be permitted to escape any retroactive application of the Act due to lack of notice. The state is not proffered the same due process protections as a private person under the Fifth Amendment. See *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966). It would undermine confidence in our legal system and constrain free enterprise if the state were to avoid financial responsibility for its own affirmative acts while Union Gas, a nonnegligent private party, is held liable for cleanup costs it did not cause.

Moreover, state immunity in this case would diminish the deterrent effect of Superfund and the economic incentive to guard against state created pollution. If the state can foist the cost of cleanup on private parties, the state need not undertake an expensive cleanup rapidly and voluntarily. This would undermine the objectives of the Act at a time when such efforts are essential. Federal government resources are grossly inadequate to cope with an estimated 10,000 hazardous waste sites requiring close to \$100 billion to clean up. States must become financially responsible for environmental hazards they create.

If this Court is to accommodate the competing interests of protecting innocent citizens from the consequences

of illegal state acts while protecting state sovereign immunity, this Court should not adopt an absolute consent rule for abrogation of the Eleventh Amendment under the Commerce Clause. Rather, the Court should consider three policy factors to determine if state consent is required in a particular case: (1) the nature and strength of the policy interest served by the statute, (2) the extent to which the statute abrogates the Eleventh Amendment, and (3) the nature of the right which the statute alters.

In this case, the interest in public health and environmental protection advanced by Superfund is substantial and urgent; abrogation of the Eleventh Amendment, under the Act, is limited to liability in federal court for states that are actively responsible for a spill; and the right to sue is only for fair contribution. Therefore, state sovereign immunity should be abrogated, without the need for consent, if Congress is deemed to have clearly expressed such intent in the Act. Such a holding, however, need not be extended beyond the particular circumstances of this case.

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## ARGUMENT

### I

#### **ABSOLUTE STATE SOVEREIGN IMMUNITY WOULD IMPINGE ON INDIVIDUAL RIGHTS AND IMPEDE THE PURPOSES OF SUPERFUND**

In his dissent in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), Justice Brennan notes that this Court has repeatedly relied on *Hans v. State of Louisiana*, 134 U.S. 1 (1890), as establishing a broad principle of state immunity from suit in federal court. He also notes that

the historical record demonstrates the *Hans* ruling rested on misconceived history and misguided logic. Ultimately, he states:

“If this doctrine [of state immunity] were required to enhance the liberty of our people in accordance with the Constitution’s protections, I could accept it. If the doctrine were required by the structure of the federal system created by the Framers, I could accept it. Yet the current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct. And the decision obstructs the sound operation of our federal system by limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority.” *Atascadero*, 473 U.S. at 302.

Putting aside any argument about whether Justice Brennan’s assessment of *Hans* is correct, his expression of the goal of judicial decision making is unassailable. This Court should seek an end, within constitutional bounds, which enhances liberty and does not unduly constrain the ability of Congress to achieve legitimate national goals. In this case, the proper end is to find the State of Pennsylvania liable for its contribution to a coal tar spill in Brodhead Creek. The national goal is to protect public health and the environment by deterring spills and fostering rapid and voluntary cleanup. If this Court reverses the lower court, it will undermine individual liberties and obstruct the congressional objective.

#### A. Congress Intended to Abrogate State Immunity

Whatever the standard is for abrogation of Eleventh Amendment immunity, it must be acknowledged that Congress intended, under Superfund, to hold states liable on

a par with all other responsible parties. The 1980 Act, 42 U.S.C. § 9601, *et seq.*, read in part:

“‘[P]erson’ means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, *State*, municipality, commission, political subdivision of a State, or any interstate body.” 42 U.S.C. § 9601(21) (emphasis added).

“... [A]ny person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of ... shall be liable for ... any other necessary costs of response incurred by any other person consistent with the national contingency plan ...” 42 U.S.C. § 9607(a)(2), (4), and (4)(B).

The 1986 amendments, 42 U.S.C. § 9601, now read in part:

“The term ‘owner or operator’ does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any *State* or local government which has *caused or contributed* to the release or threatened release of a hazardous substance from the facility, and such a *State* or local government shall be *subject* to the provisions of this chapter *in the same manner and to the same extent, both procedurally and substantively*, as any nongovernmental entity, *including liability* under section 9607 of this title.” 42 U.S.C. § 9601(20)(D) (emphasis added).

This language is clear and reasonable. It only makes good sense to hold states equally liable for spills they have



either caused or to which they have contributed. In this case, Pennsylvania was an active participant in the spill event. Its flood control activities undermined the stream bank which led directly to the discharge into the creek. There is no countervailing national interest which weighs heavier than the public interest to see state polluters liable to their own citizens in federal court. Anything less would mock justice and undercut the intent of the people, the true sovereign, to protect themselves through the Constitution from oppressive and inequitable governmental acts, federal, or state.

**B. Abrogation of Sovereign Immunity  
Will Not Impair a Public Service**

This Court should not be reluctant to find state liability here for fear of any chilling effect on state provided services. The problem this Court found in *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279, is absent in this case. In *Employees*, certain hospital and school workers brought suit against the state, in federal court, for overtime compensation due to them under the Fair Labor Practices Act (FLPA). The state claimed sovereign immunity under the Eleventh Amendment. Because liability was sought on the basis of state operation of hospitals and schools which predated the Act, the Court was concerned that the State of Missouri would have to either give up established facilities, services, and programs or else consent to federal suit. Speaking for the Court, Justice Marshall considered this no choice at all and upheld state immunity.

"To suggest that the State had the choice of either ceasing operation of these vital public services or

'consenting' to federal suit suffices, I believe, to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case." *Employees*, 411 U.S. at 296.

In the present case, however, Pennsylvania was not faced with either giving up an essential public service or else consenting to federal suit. Although Pennsylvania was engaged in flood control operations, an essential public service, at Brodhead Creek when it caused the discharge, this was not the activity which Superfund regulated. Unlike Missouri, which was regulated by FLPA in the very operation of its schools and hospitals, the State of Pennsylvania fell under the purview of Superfund and became subject to liability only when it participated in the spill. Pennsylvania was and is free to engage in flood control activities without ever entering the sphere regulated by the Act. It need only refrain from perpetrating a spill.

**C. The State Cannot Take Private  
Property Without Compensation**

The principle embodied in the Fifth Amendment, and made applicable to the states via the Fourteenth Amendment, that private property shall not be taken for public use without compensation is well established. In *Armstrong v. United States*, 364 U.S. at 49, this Court stated that the purpose of forbidding uncompensated takings of private property for public use is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Here, the State of Pennsylvania caused a spill while performing dredge and fill operations to provide flood

protection to the public. The economic burden for providing this essential public service is now being borne by a private party, Union Gas. Can there be a more obvious public burden than that created by a state when acting for the public welfare? Clearly, in the face of the principle enunciated in *Armstrong*, and in the circumstances of this case, this Court cannot elevate sovereign immunity, notwithstanding the Eleventh Amendment, over the individual rights guaranteed by the Fifth and Fourteenth Amendments. Pennsylvania must not be allowed to intrude on constitutionally protected rights and force Union Gas, an innocent landowner, to use its private funds to bear the cost of cleaning up a public spill which, in all fairness and justice, should be borne by the public as a whole from the state treasury.

Where a state has contributed to an environmental or public health risk, the state should bear a proportionate share of the cost of amelioration. Clearly, nonnegligent private parties should not have to pay for improper governmental actions. In this and other similar situations the state should be held liable on the same basis as private parties. This Court must not permit the state to unfairly shift public burdens to others in violation of constitutionally protected personal property rights and to the detriment of accustomed economic freedoms.

#### **D. Lack of Notice Does Not Preclude State Liability**

Pennsylvania must also not be allowed to avoid liability on the ground that Superfund may not be retroactively applied without violating the state's right to notice. Any notice right the state may be deemed to have under the

Eleventh Amendment must not be given greater deference than the notice right private parties can claim under the Fifth and Fourteenth Amendments.

Currently, however, individual notice rights under Superfund are not recognized. The lower courts have found it is not an unconstitutional deprivation of due process rights for generators, transporters, and landowners to be held retroactively liable for spill cleanup even when hazardous waste disposal was earlier completed in conformance with or as mandated by prior law. *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1986). If this Court cannot find retroactive liability for the State of Pennsylvania it must also not allow retroactive liability for Union Gas.

It would violate all notions of fairness and equity if the state were to find protection in the Constitution from the consequences of its own *illegal* acts while a private party finds no protection in the Constitution for its *legal* acts but is made to pay for the illegal acts of the state. In this case Pennsylvania was affirmatively at fault; it caused the spill. Union Gas was an innocent landowner. The in ground disposal of coal tar at the Union Gas site, from 1890 to 1948, is regarded by EPA, in its Amended Fund Authorization Report, as state of the art technology for the early part of this century. It would be anomalous for Union Gas to be retroactively liable without fault while Pennsylvania is allowed to pollute with seeming impunity.

Notwithstanding the lower court decisions to the contrary, it is patently unjust when, as under Superfund, retroactive liability is applied strictly (without regard to fault) and without any financial limit or chronological

boundary. Retroactive liability of the magnitude imposed under Superfund will only be just when applied to parties who are at fault, like the State of Pennsylvania. Otherwise, it serves only to provide a few "deep pockets" from which to ease the public burden.

The imposition of strict retroactive liability on non-negligent parties, like Union Gas, creates insidious and uncertain economic risks which further weaken an already waning entrepreneurial spirit and unnecessarily constrain free enterprise. Moreover, it robs innocent citizens of their reasonable expectations of justice and security. This Court must not compound the injustice done to Union Gas by allowing Pennsylvania to escape liability for lack of notice.

#### **E. State Sovereign Immunity Would Impede the Objectives of Superfund**

If states are held immune from the consequences of their illegal acts, the deterrent effect of Superfund will be greatly diminished. States will have only a limited incentive to guard against state created pollution. Also, where a state perceives no potential liability for a spill of its own making, but can expect a private party to be liable, the state will have no economic incentive to undertake an expensive cleanup rapidly and voluntarily. This outcome would threaten the congressional objective of protecting the environment and fostering voluntary cleanup.

"The legislation [CERCLA] would . . . enable the Administrator to pursue rapid recovery of the costs incurred for the . . . actions undertaken by him from persons liable therefor and to induce such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous

waste sites." H.R. Rep. No. 96-1016, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 6119, 6120.

In 1979, EPA estimated that as many as 30,000 to 50,000 hazardous waste sites existed in this country. Approximately 1,200 to 2,000 were considered to present serious risks to public health. The cleanup cost for all the sites was estimated at between \$13.1 and \$22.1 billion. *See* H.R. Rep. No. 96-1016, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News at 6120-23. Later, EPA assessed the problem to be much more severe. In 1986, the Office of Technology and Assessment estimated there may be as many as 10,000 potential Superfund sites across the nation. These sites range from industrial plants to government dumps. The total cost for completing the Superfund program is expected to be as much as \$100 billion. Congress understood that even with the \$10 billion added to Superfund by SARA that "EPA will never have adequate monies or manpower to address the problem itself." For this reason, SARA was introduced to enhance EPA's response and enforcement authority. An underlying principle of SARA is that "Congress must facilitate cleanups of hazardous substances by the responsible parties while assuring a strong EPA oversight role with a set of tough legal enforcement standards." *See* H.R. Rep. No. 99-253(I), 99th Cong., 2d Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835, 2836-37.

Abrogation of the Eleventh Amendment, to allow state liability for its spills in federal court, is a tough enforcement standard. But it is necessary. This nation cannot afford to allow any responsible party to shirk its duty to pay, to the extent of its contribution, for the cleanup of a



spill it actively caused. This Court should uphold the intent of Congress to protect the public health and the environment by holding all responsible parties liable to the limits of the Constitution. In this case, the Eleventh Amendment should not be a limit on the state's liability.

## II

### **TO ACHIEVE A JUST BALANCE BETWEEN INDIVIDUAL AND STATES' RIGHTS THIS COURT MUST NOT APPLY AN ABSOLUTE ELEVENTH AMENDMENT ABROGATION STANDARD**

Beyond the specific implications any decision in this case will have on private parties and the states with regard to spill cleanup, this Court must come to terms with the more general precedential effects this case will have on Eleventh Amendment and Article I law. Petitioner, Commonwealth of Pennsylvania, has described one of the main issues in this case as a question of "whether Congress, acting under the Commerce Clause, may abrogate the Eleventh Amendment unilaterally, that is, without any corresponding waiver or consent on the part of affected States." Petitioners' brief at 28. Of course, a consideration of this issue supposes that Congress has clearly expressed its intent to abrogate sovereign immunity in the Act.

If, on the one hand, this Court determines that, under the Commerce Clause, Congress may abrogate the Eleventh Amendment unilaterally, as all parties concede it has a right to do under the Fourteenth Amendment, this Court would seriously jeopardize the fundamental doctrine of federalism, or states' rights. The power of Congress under the Commerce Clause is already so pervasive as to

approach a general police power. Any further extension of that power could impair personal freedoms and subject states to liability at the virtual whim of Congress for acts which could not now be conceived as a basis for future liability.

If, on the other hand, this Court determines that Congress may not abrogate the Eleventh Amendment unilaterally, that consent by the state must be given, this Court runs the risk of trammeling individual liberties and constitutional notions of fairness and justice and frustrating the objectives of Congress to hold responsible parties liable and protect the environment.

This Court, therefore, should avoid adopting an absolute standard for determining abrogation of Eleventh Amendment immunity under the Commerce Clause. Rather, this Court should consider certain policy factors to determine whether consent is required in a particular case when Congress has clearly expressed its intent to abrogate sovereign immunity. Only in this way can the Court avoid an injustice in a highly precedential case and, at the same time, withhold a sweeping decision on sovereign immunity which may eviscerate the Eleventh Amendment and undermine principles of federalism. The Court should at least consider (1) the nature and strength of the policy interest served by the statute, (2) the extent to which the statute abrogates the Eleventh Amendment, and (3) the nature of the right which the statute alters. For a discussion of these factors in a different context—as applied to retroactive liability of a statute—see *Flournoy v. State of California*, 230 Cal. App. 2d 520 (1964).

The nature and strength of the policy interest served by Superfund is clear—the protection of the public from



hazardous chemical substances. Cleaning up approximately 10,000 Superfund sites at a cost of \$100 billion is "one of our most pressing environmental problems." H.R. Rep. No. 99-253(I), 99th Cong., 2d Sess., *reprinted in* 1986 U.S. Code Cong. & Admin. News at 2836-37.

The extent to which the statute abrogates the Eleventh Amendment is minimal. Superfund does not abrogate state sovereign immunity across the board under the Commerce Clause. Rather, it allows the state to be sued in federal court, by one of its own citizens, only in that limited circumstance where the state is a responsible party to a spill. The state will not be required to either give up an essential service or subject itself to liability. It must merely refrain from being a participant in a spill event.

The nature of the right which the statute alters is the right of the private party to sue the state in federal court. This right is not a windfall for the private party. In this case the state is liable only for its contribution to the spill.

When these three factors are weighed together in this case the scales tip in favor of allowing abrogation of the Eleventh Amendment, without state consent. The public interest is great, suit in federal court is limited, and the right to sue subjects the state only to liability for its contribution to the spill.

A proper ruling in this case would hold Pennsylvania liable to Union Gas in federal court, but would not create a sweeping precedent for abrogation of Eleventh Amendment immunity under Congress' Article I Commerce Power.

## CONCLUSION

As the final stronghold for the protection of individual and states' rights, this Court should maintain a just balance between the shield of the Eleventh Amendment and state liability for its own illegal acts. The public interest advanced by Superfund and the individual safeguards granted the citizens of this country by the Constitution should not be sacrificed for the sake of sovereign immunity. For the reasons stated above, this Court should rule for respondent, Union Gas.

DATED: July, 1988.

Respectfully submitted,

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